SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-893

A/S D/S SVENDBORG & D/S AF 1912 A/S,

Petitioners,

against

MARINE ENGINE SPECIALTIES, CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	3
Statement of the Case	3
(a) The Event	4
(b) The Man	7
(c) The District Court Finding	8
Reasons for Granting the Writ	9
I.—In reversing the finding of the District Court that respondent Marine Engine was negligent, the Court of Appeals applied its own standard of review which is in conflict with that of the overwhelming majority of the circuits interpreting McAllister v. United States, 348 U.S. 19 (1954) and Rule 52(a) of the Federal Rules of Civil Procedure	9
II.—In rejecting the applicability of the warranty of workmanlike service between a ship repair company and a shipowner, the Court of Appeals decision is in conflict with this Court's decision of Italia Societa v. Oregon Stevedoring Co., Inc., 376 U.S. 315 (1964)	14
III.—The decision of the Court of Appeals, upholding the 50% finding of contributory negligence, while denying indemnification to the shipowner, is in conflict with three of its own prior decisions as well as those in the Fourth and Ninth Circuits	19
Conclusion	22

Cases Cited

PAGE

Alcoa Steamship Co., Inc. v. Charles Ferran & Co., Inc., 383 F.2d 46 (5 Cir. 1967) 15

Arista Cia. DeVapores S.A. v. Howard Terminal, 372 F.2d 152 (9 Cir. 1967) 2, 20

Booth Steamship Co., Ltd. v. Meier and Oelhaf Co., 262 F.2d 310 (2 Cir. 1958) 15

Boudoin v. Lykes Bros. Steamship Co., 348 U.S. 336 (1955) 17

Chinese Maritime Trust Ltd. v. Carolina Shipping Co., 456 F.2d 192 (4 Cir. 1972) 2, 20

Cooper Stevedoring Company, Inc. v. Fritz Kopke, U.S. 94 S. Ct. 2174, 40 L. Ed. 2d 694 (1974) 19

Famous Knitwear Corporation v. Drug Fair, Inc., 493 F.2d 251 (4th Circuit 1974) 9, 12

Hartnett v. Reiss Steamship Co., 421 F.2d 1011 (2 Cir. 1970) 2, 19

Iligan Integrated Steel Mills, Inc., et al. v. s/s John Weyerhaeuser (her engines, etc.) F.2d (2 Cir. December 3, 1974) 11

Italia Societa per Azioni v. Oregon Stevedoring Co., 376 U.S. 315 (1964) 2, 14, 15, 16, 18, 19

Julian v. Mitsui O.S.K. Lines, Ltd., 479 F.2d 432 (5 Cir. 1973) 21

Lavender v. Kurn, 327 U.S. 645 (1946) 13

Mamiye Brothers v. Barber Steamship Lines et al., 360 F.2d 774 (2 Cir. 1966) 9, 11

McAllister v. United States, 348 U.S. 19 (1954) 2, 9

McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334 (2 Cir. 1969) 2, 15, 16, 19, 20

Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) 17

PAGE

Mortensen v. A/S Glittre, 348 F.2d 383 (2 Cir. 1965) 2, 19

Myers v. Reading Co., 331 U.S. 477 (1947) 13

Ryan v. Pan Atlantic Corp., 350 U.S. 124 (1956) ... 17, 18

Tennant v. Peoria and P.U.R. Co., 321 U.S. 29 (1944) 13

United States v. National Association of Real Estate Boards, et al., 339 U.S. 485 (1950) 14

United States Lines, Inc. v. Jarka Corp. of Baltimore, 444 F.2d 26 (4 Cir. 1971) 2, 20

Waldron v. Moore McCormack Lines, 386 U.S. 724 (1967) 17

Weyerhaeuser SS Co. v. Nacirema Operating Co., 355 U.S. 563 (1958) 18

Statutes and Other Authorities Cited

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2101(c) 2

28 U.S.C. § 1332 3

28 U.S.C. § 1291 3

Rule 52(a) Federal Rules of Civil Procedure 3, 9

C. Wright & A. Miller, Federal Practice and Procedure, (1971) 9, 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above case.

Opinions Below

The opinion of the Court of Appeals is reported at 501 F.2d 376. The decision of the District Court is reported at 358 F. Supp. 145. Both opinions are reprinted in the appendix hereto at pages 1A and 15A, respectively.*

* A—refers to the appendix herein. a—refers to the trial appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on the 17th of July, 1974 (p. 10A). The orders of the Court of Appeals denying a rehearing and rehearing in banc were entered on the 23rd of October, 1974 (p. 12, 13A).

The jurisdiction of this Court is invoked under 28 USC § 1254(1) and 28 USC § 2101(c).

Questions Presented for Review

1. In reversing the District Court and dismissing the third-party complaint, was not the Court of Appeals in error and in conflict with eight, and possibly nine, of the other Courts of Appeals and this Court's decision in *McAllister* v. *United States*, 348 U.S. 19 (1954), for failure to apply the "unless clearly erroneous" standard of review to the District Court's finding of negligence on the part of respondent Marine Engine Specialties Corp.?

2. In reversing the District Court and dismissing the third-party complaint, was not the Court of Appeals in error and in conflict with this Court's decision in *Italia Societa* v. *Oregon Stevedore Co., Inc.*, 376 U.S. 315 (1964) for refusing to apply the warranty of workmanlike service between a ship repair company and a shipowner?

3. Was not the Court of Appeals in error and in conflict with its own prior decisions[1] as well as decisions by the Fourth[2] and Ninth[3] Circuits, in failing to uphold the

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[1] *Mortensen* v. *A/S Glittre*, 348 F.2d 383 (1965), *McLaughlin* v. *Trelleborgs Angfartygs A/B* 408 F.2d 1334 (1969), *Hartnett* v. *Reiss Steamship Co.*, 421 F.2d 1011 (1970).

[2] *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F.2d 26 (1971), *Chinese Maritime Trust Ltd.* v. *Carolina Shipping Co.*, 456 F.2d 192 (1972).

[3] *Arista Cia. DeVapores S.A.* v. *Howard Terminal*, 372 F.2d 152 (1967).

District Court's award of indemnity to petitioner against respondent Marine Engine based upon the undisturbed finding of 50% contributory negligence of the latter's employee, decedent herein, Charles W. Nye?

Statutes Involved

Rule 52 *Findings by the Court.*

(a) Effect.

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses . . .".

Statement of the Case

District Court jurisdiction was based upon 28 USC § 1332—diversity of citizenship. Appellate jurisdiction in the United States Court of Appeals for the Second Circuit was based on 28 USC 1291.

Decedent, Charles W. Nye, was a pump repairman employed by respondent Marine Engine Specialties Corp. He lost his life while attempting to board petitioners' vessel the t/t Evelyn Maersk off Las Palmas, Canary Islands. Suit was brought on behalf of his estate against petitioners who impleaded his employer.

Trial before District Judge* Murray I. Gurfein, resulted in findings that under the applicable maritime law of the United States, petitioners were negligent and their vessel unseaworthy for failure to afford decedent proper boarding assistance, that petitioners were not negligent in their rescue efforts, that decedent was 50% contributorily

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* Now Circuit Judge.

negligent and that Marine Engine Specialties Corp. was required to indemnify petitioners for breach of its warranty of workmanlike service because of (a) decedent's contributory negligence and (b) Marine Engine's own negligence in sending a person in decedent's physical condition on such an undertaking. Damages were awarded in the net amount of $77,228 plus interest.

On appeal, the Court of Appeals affirmed the liability findings against petitioners, the dismissal of the failure to rescue count and the finding of 50% contributory negligence. It reversed the indemnity award and dismissed the third-party complaint. Petitions for rehearing and rehearing in banc were denied without opinion.

The only issue before this Court on this petition concerns that part of the judgment below which reversed the indemnity award and dismissed the third-party complaint. The statement as to the facts is therefore confined to that issue.

(a) The event.

There is little dispute as to the underlying circumstances. On December 24, 1967, the t/t Evelyn Maersk, a Danish flag tanker sailed on her maiden voyage from Denmark to the Persian Gulf. While at sea, a feed pump supplying water for the vessel's boilers broke down and the vessel was ordered into Las Palmas, Canary Islands to obtain a replacement. The pump had been manufactured by Pacific Pumps of Los Angeles who had a service agreement with Respondent Marine Engine. The latter dispatched decedent, Charles W. Nye, as the District Court said (16A) "a repairer of ship pumps" and a man familiar with Pacific Pump products.

The Court of Appeals observed (p. 2A)

> "His employment in some instances required him to travel, in his employer's behalf, to far flung ports of call on a moment's notice."

The President of Marine Engine, Edwin Burke, testified by deposition (Pl. Ex. 11) in answer to a question (p. 17) as to whether or not decendent used a pilot or Jacob's ladder to board vessels at anchorage or in the stream (p. 18) "By all means, he had at many times".

Earlier in the morning of December 30, 1967, the *Evelyn Maersk* anchored off Las Palmas and shortly thereafter a replacement pump was delivered to the vessel and hoisted on board. During the day, the vessel was notified that Nye would be arriving by pilot launch and between 4:00 and 5:00 p.m. the crew rigged an accommodation ladder and pilot ladder preparatory to taking him aboard. Both ladders are fully described in the opinion of the District Court (p. 17A). It is only necessary to state that the accommodation ladder was rigid, made of aluminum and hinged to a platform at the deck level. It did not extend all the way to the water line with the difference made up by the pilot ladder which reached within 2 feet of the water. The pilot ladder was "brand new" and was being used for the first time. It had wooden steps and rope siderails.

It was agreed in both Courts:

> "The manner of boarding by this arrangement was to climb the pilot ladder, which hung parallel to the side of the vessel, until one reached the accommodation ladder. Then the person boarding could simply walk up the accommodation ladder to the deck."

At about 7:30 P.M., the pilot launch maneuvered alongside the *Evelyn Maersk* in order to permit Nye to effect a transfer to the pilot ladder. As the District Court found (p. 19A), the transfer from the launch to the pilot ladder "was effected without incident." * * * "Nye proceeded up the pilot ladder. Gripping the rope-sides of the ladder, Nye climbed between one and three steps upward. Sud-

denly Nye stopped and shouted 'help me, help me' * * * and shortly thereafter he fell into the water."

Among other efforts a life ring was thrown to him which he grasped initially. The pilot launch attempted to effect a rescue but without success. After Nye had drifted some distance alongside the vessel, it was noticed that he was no longer holding the life ring and had disappeared.

The shipowner was held liable for failure to have someone on the platform of the accommodation ladder to help in such a situation, and for failure to have a boat rope and a man rope. A boat rope is a line attached to the vessel to secure a launch to the vessel. A man rope is a line hanging down the side of the ship near the pilot ladder which is supposed to provide an extra handhold for someone boarding.

As to the first claim, petitioner urged upon both Courts that there *was no platform* at the foot of the accommodation ladder; that when the Chief Officer noticed decedent was in difficulty, he ran halfway down the ladder, but by this time it was too late. Decedent had fallen. As to the boat rope, since the pilot launch was in the vicinity anyway, it is difficult to visualize what difference having the boat tied to the vessel would have made other than to restrict its maneuverability. And as to the man rope, since decendent had both arms occupied holding onto the side rails of the ladder and was thereafter unable to hold onto the ladder or the life ring thrown to him, any assistance or security afforded by an additional rope would appear negligible.

Although petitioner remains unconvinced of its initial liability to plaintiff, it did not contest the affirmance on this point in its rehearing petition and does not challenge that liability here. Indeed, it is only mentioned to demonstrate how peripheral these factors are as compared

with the precipitating cause of the incident, namely decendent's disability or inability, physically or psychically, to climb or even cling to the pilot ladder, or to maintain a grip on the life ring thereafter thrown to him in the water.

(b) The man.

Marine Engine had employed decedent for 5 years prior to his death. He was given no pre-employment physical examination according to its President (Pl. Ex. 11, Burke pp. 3-5). There is no evidence he had any subsequent examination.

Decedent suffered from multiple infirmities, many of which were evident even upon casual observation. He was, as the Court of Appeals agreed, "grossly obese" and "weighed 350 lbs" (2A). He was afflicted with high blood pressure, hypertension, diabetes, possibly kidney disease, and an inability to adequately ventilate his lungs which resulted in decreased oxygen to the body (p. 3A and 482a). He suffered from dyspnea or shortness of breath (491a). He had an enlarged heart (488-489a) and an electrocardiogram indicated right heart abnormalities (492a). He suffered from hypertensive cardiovascular heart disease and mild congestive heart failure (548a). In the opinion of two doctors, his life expectancy was foreshortened (494a, 555a). Dr. Milton Helpern, former Chief Medical Examiner for the City of New York, said (555a)

> "I would say that I would not consider this man a very good risk for work, strenuous work over a long period of time."

Petitioners introduced evidence showing decedent's inability in December of 1965 to climb a shorter pilot ladder in the sheltered waters of the Delaware River without tying a line around himself. After a slow passage to the

deck, he was noticeably breathing hard (Kingston 598a-604a). The latter manifestation can be traced directly to his shortness of breath and low lung capacity.

(c) The District Court Finding.

On such a record the District Court not unexpectedly concluded that decedent's condition was (p. 29A) "morbid" and that "His chances for longevity were considerably below average". Giving plaintiffs "the benefit of some doubt", he found that decedent's work expectancy would not exceed age 55.

It is no exaggeration to state that in such condition, decedent's remaining life span might have ticked away at any time, on any ship especially under stress and exertion. Against this massive backdrop of evidence, the District Court noting (p. 25A):

> "The warranty of workmanlike service extends not only to material but also to human resources".

then specifically ruled (p. 26A)

> "I find that the employer of Nye was, in fact, negligent in ordering a man in Nye's physical condition to hazard a journey which could involve climbing onto a vessel at sea.

Reasons for Granting the Writ

I

In reversing the findings of the District Court that respondent Marine Engine was negligent, the Court of Appeals applied its own standard of review which is in conflict with that of the overwhelming majority of the Circuits interpreting *McAllister* v. *United States*, 348 U.S. 19 (1954) and Rule 52(a) of the Federal Rules of Civil Procedure.

The District Court found respondent Marine Engine breached its warranty of workmanlike service by negligently sending someone in decedent's "morbid" physical condition to "hazard a journey which could involve climbing onto a vessel at sea".

Putting aside until II, *infra*, a discussion of the warranty of workmanlike service, which the Court of Appeals inexplicably said was not applicable to this case, the Court below, in overturning the finding of negligence as to Marine Engine, applied its own standard of review which does not regard a finding of negligence, causation or contributory negligence as protected by the "unless clearly erroneous" criterion set forth in Rule 52(a) of the Federal Rules of Civil Procedure.

The divergence of the Second Circuit from the majority rule has been conspicuous since its definitive decision on the subject in *Mamiye Brothers* v. *Barber Steamship Lines, Inc., et al.*, 360 F.2d 774, 776-778 (1966). Despite comments that the Second Circuit has retrenched somewhat, see, for example, *Famous Knitwear Corportion* v. *Drug Fair, Inc.*, 493 F.2d 251, 253, Footnote 2, (4th Circuit 1974) and *Wright & Miller, Federal Practice and Procedure*, Volume 9, §2590, p. 765, recent decisions, including the one at bar, would indicate that the Court below is as determined as ever to pursue its own way. This inevitably results in

forays, as here, into forbidden factual areas, rationalized on grounds that mixed questions of law and fact are involved. Thus against the District Court's findings of pure fact, fully documented by the evidence, that a man in decedent's physical condition should not have been sent on such an expedition, the Court of Appeals, while acknowledging (p. 2A) such observable conditions as decedent being "grossly obese", "weighed three hundred and fifty pounds" and suffered from a "Pickwickian Syndrome, a condition marked by lack of oxygen and somnolence in the body due to excessive obesity", was nonetheless, moved to conclude (p. 7A) that there was nothing "which might have put the company on notice that he should not have been sent on such mission".

The District Court of course knew that decedent had not been given a pre-employment physical examination as admitted by Marine Engine's President and there was no evidence of his having any subsequent or annual physical check-ups. Had such occurred, decedent's infirmities would have been fully revealed with the hoped for result that he would have been restricted to less arduous activities.

It is submitted that the District Court finding as to negligence was solidly grounded, at the very least, on constructive notice to Marine Engine of decedent's condition.

Similarly, the District Court's finding that decedent's expedition "could involve climbing onto a vessel at sea" is more than amply supported, again from the testimony of Marine Engine's President who agreed that decedent had "many times" employed a pilot or Jacob's ladder to board vessels at anchorage or in the stream. It was entirely foreseeable that this could involve boarding under varying sea conditions and methods of ladder rigging.

Here again the Court of Appeals encroached upon the preserve of the District Court by noting that Marine Engine could not have known of the actual condition of the sea or

the boarding facilities available. Remaining within the negligence framework, and not even considering the warranty of workmanlike service obligation discarded by the Court below, we bear witness to an overly rigorous review of the findings of fact and reasonable inferences to be drawn from them, which has predictably degenerated into the Court of Appeals imposing its view of the facts and inferences upon the District Court.

Simply summed up the District Court said decedent was unfit for boarding a ship at sea and Marine Engine knew or should have known of this. The Court of Appeals disagreed and said Marine Engine was oblivious as to both decedent's condition, and what he would be faced with upon boarding.

That the Second Circuit intends no rapprochement with the other Circuits is apparent from its even later (December 3, 1974) decision in *Iligan Integrated Steel Mills, Inc., et al.* v. *s/s John Weyerhaeuser, her engines, etc.*, — F.2d — (slip opinion, p. 533) by Circuit Judge Friendly, author of *Mamiye Bros.* v. *Barber Steamship Lines, Inc., supra.* The current thinking of the Court is apparent in such statements as (p. 536); "Although we do not consider the judge's conclusions to be in error, even under this Circuit's standard for review, . . ." (emphasis added), citing *Mamiye,* and on page 541 where it is noted that the decision of the fact finder was

> "protected in many circuits by the 'unless clearly erroneous' rule, see e.g. *Merritt* v. *Interstate Transit Lines,* 171 F.2d 605, 608-09 (8th Cir. 1948); *Imperial Oil Co.* v. *Drlik,* 234 F.2d 4, 10 (6 Cir.), cert. denied, 352 U.S. 941 (1956); *Pacific Tow Boat Co.* v. *States Marine Corp.,* 276 F.2d 745, 752 (9 Cir. 1960), and enjoying great weight even in this one."

That the Second Circuit constitutes a distinct minority, if not rapidly becoming the sole holdout from the general

rule, is evident from the Fourth Circuit decision of *Famous Knitwear Corp.* v. *Drug Fair, Inc.*, 493 F.2d 251, 253, Footnote 2 (1974). Suggesting that it was now moving into line with the majority that Court observed:

> "Although we presently have no occasion to review the correctness of the *Hicks* decision, we note that seven circuits (8 by actual count) have taken positions contrary to that decision and have held the clearly erroneous standard applicable to the finding or conclusion of negligence." (Parenthetical reference supplied)

C. Wright & A. Miller, Federal Practice and Procedure, Volume 9, § 2590 describe the singular position of the Second Circuit even more starkly. Noting (p. 762) that "The natural and normal reading of the (McAllister) case is that the Supreme Court held that a determination of negligence is reviewed under the 'clearly erroneous rule', they go on to say:

> Most of the courts of appeals have read McAllister in this natural way. Accordingly they have held, in many cases, that findings of negligence—and of contributory negligence—are to be tested by the 'clearly erroneous' standard. They have also applied that standard to findings on such related issues as unseaworthiness and proximate cause.
>
> This point would probably now be clearly settled everywhere were it not for the persistence with which the Second Circuit clung to its traditional view that findings of negligence are not protected by the 'clearly erroneous' rule."

Wright & Miller conclude (p. 766):

> "Eight of eleven circuits follow the view that findings of negligence cannot be disturbed unless 'clearly erroneous' while the position is not wholly

> clearcut in the three circuits that seem to take a contrary position. The only Supreme Court decision in point supports the view of the great majority of the circuits. So does sound policy."

It would appear that the facts herein are more clearly established or at least more tangible and capable of ascertainment than those in *McAllister*. The finding by the District Court that decedent was unfit for the undertaking, and noticeably so, is thoroughly documented. His inability to climb or even hold on to the pilot ladder make for a compelling inference that he was stricken with some disability brought on by one or more of his multiple physical infirmities.

In *McAllister*, the relationship between the presence of various Chinese aboard the vessel and plaintiff's contraction of polio was more elusive. Yet, this Court held at p. 22 of 348 U.S. that while the conclusion could not be reached with certainty the Chinese carried the polio virus and communicated it to plaintiff "But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved . . ." .

Interestingly enough, when stating "Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous", this Court cited two jury cases, *Myers* v. *Reading Co.*, 331 U.S. 477, 485-486 and *Tennant* v. *Peoria and P.U.R. Co.*, 321 U.S. 29. Such a reference furnishes support for the argument that this Court intended that the clearly erroneous standard of review in non-jury and admiralty cases was virtually indistinguishable from the standard of review in jury cases as described in *Lavender* v. *Kurn*, 327 U.S. 645, 653, quoted in the *Myers* case,

> "But where as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with

> its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable."

It is difficult to differentiate the foregoing language from that in *United States* v. *National Association of Real Estate Boards, et al.*, 339 U.S. 485, 495, (1950), a non-jury determination:

> "It is not enough that we may give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. (Citations omitted). We are not given those choices because our mandate is not to set aside findings of fact "unless clearly erroneous".

II

In rejecting the applicability of the warranty of workmanlike service between a ship repair company and a shipowner, the Court of Appeals decision is in conflict with this Court's decision of *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1961).

The Court below said (p. 7A):

> "The principles set forth in cases dealing with a stevedore's implied warranty of workmanlike service are not applicable in this case."

The District Court had held the maritime law of the United States to govern this accident in the Canary Islands and this went undisputed by any of the parties on appeal.

The decision of the Court of Appeals might appear to make a distinction between a marine repair company

and a stevedore contractor as to the application of the warranty of workmanlike service. Such a distinction, if ever it existed, was erased in *Booth Steamship Co., Ltd.* v. *Meier and Oelhaf Co.*, 262 F.2d 310, 312-313 (2 Cir. 1958). Significantly, this Court in accepting certiorari in *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315 did so on the strength of Booth (p. 318) and then went on to uphold the principles of indemnity enunciated therein. Since the author of the opinion in the Court of Appeals here was also on the *Booth* panel and, while sitting by designation wrote the decision for the Fifth Circuit in *Alcoa Steamship Co., Inc.* v. *Charles Ferran & Co., Inc.*, 383 F.2d 46, 50 (1967) that a ship repair company owed such a warranty of workmanlike service to a shipowner, petitioner herein moved for rehearing to resolve this seeming inconsistency, but without success.

The only explanation given for discarding the warranty of workmanlike service was that Marine Engine "thousands of miles away" had no control over the boarding operation and "played no role in the forthcoming tragedy" (p. 7A). If accurate, this might supply a reason why the warranty of workmanlike service was *not breached* but not one for denying its application to the relationship between shipowner and ship repairman.

The Court of Appeals acknowledged (p. 6A) that the District Court found "Marine Engine breached its warranty of workmanlike service to the owners of the *Evelyn Maersk* when it sent a man in Nye's physical condition to the ship . . .". To the extent that the Court of Appeals may have rejected the finding, based on substantial evidence, that decedent was physically unfit for such an undertaking, it has overturned a finding of fact without holding it clearly erroneous. To the extent that the Court of Appeals has held a warranty of workmanlike service inapplicable to this case it is in conflict with *Italia*, if not its own decision of *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334, 1337 (1969).

The language of *Italia* with respect to gear failure is strikingly apposite as to man failure, 376 U.S. 315, 323:

> "*True the defect here* was latent and the stevedore free of negligent conduct in supplying the rope. But latent defects may be attributable to improper manufacture or fatigue due to long use and may be discoverable by subjecting the equipment to appropriate tests. Further, the stevedore company which brings its gear on board knows the history of its prior use and is in a position to establish retirement schedules and periodic retests so as to discover defects and thereby insure safety of operations. See *Booth SS Co.* v. *Meier and Oelhaf Supra.* It is considerations such as these that underlie a manufacturer's or seller's obligations to supply products free of defects and a shipowner's obligation to furnish a seaworthy vessel. They also serve to render a tort standard of negligence inapplicable to the stevedore's liability under its warranty of workmanlike service. For they illustrate that liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless, to minimize the risk; the stevedore is not."

In *McLaughlin*, 408 F.2d 1334, 1337 (1969) the Court of Appeals said of *Italia*:

> "We see no reason to suppose that the Italia doctrine applies only to material and not to human resources;"

The obligation of a shipowner to warrant the seaworthiness of the vessel, the manufacturer's warranty of its product and the contractor's warranty of workmanlike performance have been unmistakably equated in *Italia*, 376

U.S. 315, 318-321, 322 (1964). This Court there described the same criteria of reasonable fitness for intended use in comparing the indemnity decision of *Ryan* v. *Pan Atlantic Corp.*, 350 U.S. 124 (1950), with the seaworthiness decision of *Mitchell* v. *Trawler Racer, Inc.*, 362 US. 539 (1960). This Court has historically applied the warranty of seaworthiness to deficiencies in personnel as well as equipment, see *Boudoin* v. *Lykes Bros. Steamship Co.*, 348 U.S. 336, 339 (1955):

> "We see no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other".

and also *Waldron* v. *Moore McCormack Lines*, 386 U.S. 724 (1967).

Under the *Italia* doctrine, therefore, Marine Engine, having employed decedent for five years was in the best position to subject him to "appropriate tests" and "periodic retests to discover defects" and if necessary to delegate less strenuous work to him. Marine Engine was "best situated to adopt preventive measures" as to decedent and thereby "reduce the likelihood of injury".

The shipowner awaiting a repairman, whom it had never seen, one of "uncertain lay status" (p. 22A) had at best only a limited opportunity of several minutes to observe decedent in the artificially illuminated waters off Las Palmas and was "powerless to minimize the risk" of whatever disability prevented him from climbing, or even clinging to, the pilot ladder of the t/t *Evelyn Maersk* or the life ring thrown to him on that fateful night of December 30, 1967.

For the Court of Appeals therefore to say that Marine Engine "played no role in the forthcoming tragedy", "had no control over the operation" and was not "on notice that he should not be sent on any such mission", is to ignore not only the teaching of *Italia*, but Marine Engine's control over the principal instrument of decedent's death—

namely decedent himself. Whether Marine Engine's office was "thousands of miles" or three blocks away would seem to be irrelevant under such consideration.

As to any requirement of notice, this Court said in *Italia*, p. 322:

> "the issue of breach of the undertaking does not turn on whether the contractor knew or should have known that his equipment was safe, but on *whether the equipment was in fact safe and fit for its intended use.*" (Emphasis added)

The references by the Court of Appeals to indemnification in terms of the difference of degree of fault between two tort feasors toward an injured plaintiff is inappropriate in light of the decisions of this Court relative to the warranty of workmanlike service. This Court said in *Ryan* v. *Pan Atlantic Corp.*, 350 U.S. 124, 130 (1956) referring to that obligation.

> "It is not an action by or on behalf of the employee and it is not one to recover damages 'on account of' an employee's 'injury or death' ".

p. 131:

> "The shipowner's action herein is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third party complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner."

Later, in *Weyerhaeuser SS Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 569 (1958) this Court observed that

> "in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."

Italia found (p. 323) "a tort standard of negligence inapplicable to the stevedore's liability under its warranty of workmanlike service".

As also noted in *Italia*, p. 321, the ship-owner's recovery under the warranty of workmanlike service "is not necessarily affected or defeated by the shipowner's negligence whether active or passive, primary or secondary".

Nor can there be contribution between the shipowner and Marine Engine since decedent was an employee of the latter. See *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke,* U.S. , 94 S. Ct. 2174 40 L. Ed 2d 694 (1974).

III

The decision of the Court of Appeals, upholding the 50% finding of contributory negligence, while denying indemnification to the shipowner, is in conflict with three of its own prior decisions as well as those in the Fourth and Ninth Circuits.

Heretofore, the Court of Appeals for the Second Circuit has held that various types of marine contractors had breached the warranty of workmanlike service by reason of a finding of contributory negligence on the part of their plaintiff-employees, *Mortensen* v. *A/S Glittre,* 348 F.2d 383 (1965) (painting contractor—33⅓% contributory negligence), *McLaughlin* v. *Trelleborgs Angfartygs A/S,* 408 F.2d 1334 (1969) (repairman contractor—16⅔% contributory negligence) and *Hartnett* v. *Reiss Steamship Co.,* 421 F.2d 1011 (1970) (stevedore contractor—1% contributory negligence).

No difference in kind can be discerned, in their respective disregard for safety procedures, between Gustav Mortensen who forgot about the oil slick on the engine room

skylight of the m/s Ferngrove) Charles McLaughlin who carelessly slipped on oily bearings in the engine room hoist of the m/s Lake Ontario, Peter Hartnett who forgot that the portside ladder on the s/s *William A. Reiss* did not reach all the way to the deck of the hold, and Charles Nye who did not request or obtain the special boarding assistance he required by reason of his size and multiple infirmities.

Perhaps even more incongruously, while Hartnett's 1% contributory negligence in carelessly descending a ship's ladder resulted in the Court of Appeals approving a full indemnity award, decedent's 50% negligence in carelessly ascending a ship's ladder was given no similar effect.

In *McLaughlin*, the Court of Appeals stated

> "If the warranty were only of the more limited sort, the contributory negligence of an employee, although some evidence of breach, would not alone support a verdict in favor of the indemnitee, let let alone the direction of one.
>
> We think, however, that under *Italia Societa per Azioni* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964) the WWP is not so limited."

The United States Court of Appeals for the Fourth Circuit finds itself in agreement with the Second Circuit that the contributory negligence of the injured workman "is imputed to the stevedore and becomes actionable as a breach of the stevedore's warranty of workmanship". *United States Lines, Inc.* v. *Jarka Corp. of Baltimore*, 444 F.2d 26, 28 (1971), see also *Chinese Maritime Trust Ltd.* v. *Carolina Shipping Co.*, 456 F.2d 192 (4 Cir. 1972). The Ninth Circuit is of like mind. *Arista Cia DeVapores S.A.* v. *Howard Terminal*, 372 F.2d 152, 154 (1967).

> "Failure of a longshoreman to safely perform his duties constitutes a breach of the stevedore's war-

> ranty rendering the stevedoring company liable for all harm of the shipowner resulting from the breach. This is true whether negligence of the longshoreman injures only himself or others."

Even the Court of Appeals for the Fifth Circuit which has taken the "factor" approach rejected by the Second Circuit in the *McLaughlin* decision, *supra,* will consider contributory negligence in assessing the contractor's breach of warranty.

In *Julian* v. *Mitsui O.S.K. Lines, Ltd.,* 479 F.2d 432 (5 Cir., 1973) the Court stated, initially, at 433:

> "The question presented is whether the longshoreman's contributory negligence is merely a factor to be weighed in determining whether the stevedore has breached its warranty of workmanlike performance, or whether any contributory negligence constitutes a breach of the stevedore's warranty as a matter of law."

The issue was immediately resolved as follows:

> "The rule in this Circuit is that contributory negligence '* * * is a factor to be taken into consideration on the issue of breach of the contractor's [stevedore's] implied warranty.'" (Citations omitted).

Judge Thornberry dissenting in *Julian* stated as follows at 479 F.2d, 434-435:

> "First, in considering the question of the stevedore's breach of warranty of workmanlike performance, I believe we should follow the per se rule of the Second, Fourth and Ninth Circuits that the longshoreman's negligence constitutes a breach of warranty of workmanlike performance as a matter of law. This rule accords better with the precedents and with logic than the majority's approach."

Needless to say, in view of all the foregoing, it is difficult to understand the Second Circuit's present position on the subject. A rehearing petition seeking clarification proved unavailing.

It is now over two years since the effective date of the amendments to the Longshoreman and Harbor Workers Compensation Act on November 27, 1972. Under Section 905 of Title 33, as amended, an action for indemnification is no longer permitted and the effect of a ruling by this Court settling the law would not have the same impact as it would if the amendments had not been enacted. Nevertheless, for as long as litigation remains for those accidents occurring prior to the amendments, and there seems to be still a substantial number at the trial and appellate levels, it would seem that the sound administration of justice would require a certain amount of consistency and predictability in decisions, particularly within a Circuit which has adhered to a certain pattern heretofore and then unexpectedly abandoned it in this litigation.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari herein be granted.

Dated: January 17, 1975

Respectfully submitted,

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INDEX TO APPENDIX

	PAGE
Opinion of the Court of Appeals	1A
Judgment of the Court of Appeals	10A
Order Denying Rehearing by Court of Appeals	12A
Order Denying Rehearing in Banc by Court of Appeals	13A
Opinion of District Court	15A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 700, 846 and 1006, Dockets 73-2280,

73-2313 and 73-2417

(Argued March 22, 1974 Decided July 17, 1974)

DORRIS E. NYE, Individually and as Administratrix *Ad Prosequendum* of the Estate of CHARLES W. NYE, Deceased, et al.,

Appellees-Appellants,

v.

A/S D/S SVENDBORG and D/S AF 1912 A/S,

Appellants-Appellees,

A/S D/S SVENDBORG and D/S AF 1912 A/S,

Appellees-Appellants,

v.

MARINE ENGINE SPECIALTIES CORPORATION,

Appellant-Appellee.

Before:

MOORE, FEINBERG and MULLIGAN, *Circuit Judges.*

MOORE, *Circuit Judge*:

The t/t Evelyn Maersk is a turbine tanker of 53,277 gross tons and 35,998 net tons. She is approximately 880 feet long, has a molded depth of nearly 60 feet and is powered by a 22,500 shaft horsepower, steam turbine engine. The Evelyn Maersk sailed on her maiden voyage

from Elsinore, Denmark, on December 24, 1967, bound for the Persian Gulf. While at sea on December 26, 1967, a feed pump supplying water to the vessel's boilers broke down and the vessel was ordered into Las Palmas, Canary Islands, in order to obtain a replacement for this pump.

The vessel's feed pumps were manufactured by the Pacific Pump Company of California, whose service agent on the Eastern Seaboard of the United States was third party defendant, Marine Engine Specialties Corporation (Marine Engine). Since the Pacific pumps aboard the vessel were still under guarantee, Oreste DeFerro, Service Manager for Pacific's Eastern Division, requested that a qualified representative of the manufacturer proceed to the ship to investigate the situation. Marine Engine dispatched its employee, Charles W. Nye to Las Palmas to board the Evelyn Maersk and continue with her to Capetown, South Africa.

Nye, a graduate of the United States Merchant Marine Academy at Kings Point, was forty-six years old. From 1946 to 1956 he was directly employed by the Pacific Pump Company of California in Huntington Park, California. From 1957 to 1962 he worked, as a specialist in Pacific's pumps, for the L. O. Arringdale Company, agents for Pacific. For the five years immediately preceding the events that underlie this case, *i.e.*, from 1962 to 1967, Nye had been a resident of New Jersey, employed by Marine Engine as a service engineer for pumps manufactured by Pacific. His employment in some instances required him to travel, in his employer's behalf, to far flung ports of call on a moment's notice. He had been married to Dorris Nye for some twenty-two years and they had six children. During all his adult life, indeed even as far back as his early childhood, Nye could be accurately described as grossly obese. He was approximately six feet in height and he weighed three hundred and fifty pounds.

Nye's excessive weight had given rise to many different health problems. On June 27, 1961, he was admitted to St. Peter's Hospital in New Brunswick, New Jersey, for an evaluation of high blood pressure, obesity and headaches. He was discharged with a diagnosis of hypertension, obesity and hypothyroidism. On January 1, 1965, Nye was diagnosed as having a diabetic condition. On September 6, 1966, in addition to his previous maladies, Nye evidenced protein in his urine, possible kidney disease, swelling of the ankles and Pickwickian Syndrome, a condition marked by lack of oxygen and somnolence in the body due to excessive obesity.

The t/t Evelyn Maersk arrived at Las Palmas at 5:30 a.m. on December 30, 1967, and anchored one-half nautical mile east of the harbor pier. At 6:00 a.m., a spare feed pump was brought out to the ship by a boat from the shore and hoisted aboard. The District Court found that "The defective pump was removed to the deck and the new pump was put in its place by the ship's engineers."

When Nye arrived at Las Palmas he notified the vessel's agents of his presence and informed them of his intention to board the ship. They, in turn, passed that information along to Captain Jensen, the owners' Marine Superintendent aboard the vessel.

Sometime between 4:00 and 5:00 p.m., the ship's crew, pursuant to the orders of Captain Jensen, rigged an accom-

---

[1] The accommodation ladder is a rigid aluminum gangway structure which is attached at an angle to the deck railing of the ship. It extends to within eighteen feet of the water. The distance between the end of the accommodation ladder and the sea is traversed by a pilot ladder. The pilot ladder is made of rope and has wooden steps set approximately one foot apart and hangs from the ship's rail to within three feet of the water.

> "The manner of boarding by this arrangement was to climb the pilot ladder, which hung parallel to the side of the vessel, until one reached the accommodation ladder. Then the person boarding could simply walk up the accommodation ladder to the deck." Nye v. A/S D/S Svendborg, 358 F.Supp. 145, 148 (S.D.N.Y.1973).

modation ladder and pilot ladder on the vessel's starboard side in preparation for taking Nye on board.[1] Neither boat ropes nor man ropes were rigged.[2]

About 7:25 p.m., after the launch carrying Nye out to the ship had been sighted, the Evelyn Maersk weighed anchor, was put underway and maneuvered to form a lee on her starboard side in order to effectuate Nye's transfer from the launch.[3]

At 7:30 p.m., the time of boarding, the wind was from the north-northeast at approximately seventeen to twenty-one knots. There were waves from four to eight feet high and night had fallen. At the time of boarding, a five bulb cluster light, totaling 375 watts, was rigged directly above the pilot ladder. Further illumination was provided by a 400 watt gangway light and two 400 watt floodlights.

The launch carrying Nye had to make three passes at the ship before Nye could grab hold of the pilot ladder. Once Nye stepped on to the ladder, the launch moved away. After Nye proceeded up one or two steps on the pilot ladder, he stood still and called for help. Arne Moller, the ship's chief officer, ran half way down the ship's accommodation ladder. By that time, however, Nye had let go of the pilot ladder and had fallen into the sea. Hansen, a seaman who had been assisting at the boarding, immediately

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[2] A boat rope is simply a line attached to the deck railing used to secure to the ship any vessel coming alongside to transfer cargo or passengers. A man rope is another line, similarly attached, which hangs down the side of the ship adjacent to the ladders, to provide an extra handhold for one who is boarding.

[3] A ship "forms a lee" by placing herself between the boarding passenger and the wind. "The purpose of executing the lee is to shield the side of the ship where boarding is to take place from the effects of wind and water motion." Nye v. A/S D/S Svendborg, *supra.*

threw a life ring to Nye. Moller then proceeded back up the accommodation ladder and caller the bridge to alert the captain of a man overboard and to have the ship's propeller stopped.

By this time two minutes had passed and Nye, grasping the life ring, had drifter about one hundred and ten feet aft of the pilot ladder. A crew member had thrown the free end of a boat ladder over the side of the ship. The purpose of lowering this ladder was to allow a crew member to descend it to grasp Nye as he drifted aft. However, no crew member was sent down this ladder because Moller had by this time turned on an additional spotlight (the starboard lifeboat light) and by its illumination he could see that Nye was no longer holding the life ring. He had vanished.

Moller, with the help of the ship's boatswain, searched the water to the ship's starboard and stern. The launch which had brought Nye to the Evelyn Maersk was also equipped with a spotlight and it too searched the area. The Evelyn Maersk continued in this fashion for about one-half to three-quarters of an hour. It then asked for permission from local authorities to leave the harbor and did so at 10:17 p. m. At no time did the Evelyn Maersk lower a boat into the water. No marker lights, life rafts or additional life rings were thrown into the water. No general alarm was ever sounded aboard the hip. Recovery of Nye's body took place without any help from the officers or crew of the Evelyn Maersk.

Plaintiffs, the wife and children of decedent Nye, instituted this suit against A/S D/S Svendorborg and D/S AF 1912 A/S, the owners of the Evelyn Maersk, basing recovery on an alleged two-fold breach of duty: (A) failure to provide decedent, concededly an invitee brought to the vessel as a pump expert, with reasonably safe ingress, in violation of their obligations under the laws of warranty and

negligence; (B) negligent failure to take reasonable measures calculated to rescue decedent from the waters.

The District Court, after a trial without a jury, found that defendants had culpably failed to comply with their obligation of safe ingress to decedent in that their agents neglected to follow the commands of good seamanship respecting the furnishing of a boat rope to secure the arriving pilot launch to the vessel, providing a man rope as security in the event of slipping or falling, and placing of a crew member on the rigging to assist the boarding invitee. However, the court found that decedent, a man of unusual physical dimensions, must be charged with fifty percent of the responsibility for failing to request additional boarding apparatus.

The District Court additionally found that the Evelyn Maersk took reasonable steps to rescue Nye under the circumstances.

Finally, the court found that Marine Engine breached its warranty of workmanlike service to the owners of the Eveliyn Maersk when it sent a man in Nye's physical condition to the ship and held Marine Engine liable to defendants in indemnity, including counsel fees and costs. Thus, plaintiffs recovered $154,439, reduced by fifty percent to $77,220, plus the sum of $10,434 pre-judgment interest or a total award of $87,654, an amount under the trial court's indemnity theory to be borne by Marine Engine.

All parties appeal: plaintiffs claim that their decedent was not contributorily negligent; defendants claim that they were in no way negligent and did, in fact, provide Nye with the means of safe ingress on to their ship; the third party defendant denies its liability in indemnity.

In view of our disposition of this case, it will be unnecessary to consider whether Nye had the status of a seaman or whether the ship was unseaworty. The ship and its owners, as the District Court held, owed Nye, regardless of

his status, a duty of safe ingress. Thus, only three points remain for consideration: (1) should Marine Engine be required to indemnify the shipowner for the damages resulting from the shipowner's failure, if any, to satisfy its duty to provide safe ingress; (2) was the ship guilty of negligence in its efforts to provide safe ingress or to effect rescue; and (3) was Nye guilty of contributory negligence?

The principles set forth in cases dealing with a stevedore's implied warranty of workmanlike performance are not applicable in this case. It was the ship's duty to take all steps necessary under the circumstances to get Nye on board safely. Marine Engine at this juncture played no role in the forthcoming tragedy. Situated in Hoboken, New Jersey, thousands of miles away, it had no control over the operation. The equipment and personnel to be used for Nye's board were supplied by the ship.

The only participation which Marine Engine had even remotely connected with Nye's death was in sending him to Las Palmas in the first place. To be sure, the trial judge found that Marine Engine had acted negligently in doing so. However, we believe that the district court's conclusion on this mixed question of fact and law, *see, e. g.*, Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 776-778 (2d Cir.), cert. denied, 385 U.S. 835, 87 S.Ct. 80, 17 L.Ed.2d 70 (1966), was erroneous and, accordingly, we set it aside. Marine Engine could not have known of the condition of the sea at the time of the attempted boarding, the facilities available to enable Nye to board, or those methods actually to be used. Nye had served the company well over the years on various assignments and, despite his unusual weight problem, apparently without incident which might have put the company on notice that he should not be sent out on any such mission. In short, of all participants Marine Engine would appear to be the least culpable.

Indemnity, apart from express contract, can either be implied in law or implied in fact. If it is implied in fact it is said to be derived from the nature of the relationship of the parties. On the other hand, if the right is to be implied in law, it must be based "on a 'great difference' in the gravity of the fault of . . . two tortfeasors; or . . . upon a disproportion or difference in [the] character of the duties owed by the two to the injured plaintiff." W. Prosser, Law of Torts 313 (4th ed. 1971). Application of either theory under the circumstances dictates the conclusion that any negligence leading to Nye's death must be attributed ultimately to the ship and her owners, not to Marine Engine.

This leaves for consideration the issue of the ship's negligence and Nye's contributory negligence.

Hindsight presents the questions: should the ship have offered Nye the safety belt and additional ropes that were available but ultimately not used; should the ship have insisted on their use before Nye attempted to board; should the ship have declared the sea too rough for the transfer; should Nye, realizing his own physical limitations, have requested these additional safety devices before stepping onto the pilot ladder; and should something more have been done to try to effect a rescue?

The District Court answered some of these questions. It found the ship negligent in its conduct; it found the ship's rescue efforts reasonable; and it found Nye fifty percent (50%) contributorily negligent for not having insisted upon adequate safety equipment before making the attempt to board.

We see no reason to disturb the trial court's holdings on these issues. To be sure, findings of negligence and contributory negligence involve mixed questions of fact and law and are subject to more stringent appellate review than findings of fact covered by the "clearly erroneous" test. *See, e. g.,* Mamiye Bros. v. Barber Steamship

Lines, Inc., *supra*, 360 F.2d at 776-778; Falletta v. Costa Armatori, 476 F.2d 316, 318 (2d Cir. 1973). Nevertheless, such findings should not be set aside where, as here, they rest upon underlying findings of fact which are not themselves clearly erroneous and the trial court's opinion shows a thorough understanding of the applicable principles of law. *See* Dinnerstein v. United States, 486 F.2d 34, 37-38 (2d Cir. 1973).

The trial court's judgment in favor of plaintiffs and against defendants A/S D/S Svendborg and D/S AF 1912 A/S in the sum of $87,654 ($154,439 as found by the District Court, reduced by 50% because of contributory negligence to $77,220 plus pre-judgment interest of $10,434) with costs, is affirmed; the judgment is said amount plus costs, counsel fees and disbursements to be agreed upon or fixed by the Court against the third party defendant in favor of the third party plaintiff is reversed and the third party complaint is dismissed.

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at United States Courthouse in the City of New York, on the seventeenth day of July one thousand nine hundred and seventy-four.

Present:

HON. LEONARD P. MOORE
HON. WILFRED FEINBERG
HON. WILLIAM H. MULLIGAN
Circuit Judges.

73-2280, 73-2313, 73-2417

DORRIS E. NYE, individually and as Administratrix *Ad Prosequendum* of the Estate of Charles W. Nye, deceased, Susan Pamela Nye, and by their mother and natural guardian, Dorris E. Nye, Judith Denise Nye, Gloria Jane Nye, Phillip Rex Nye and Donna Charlene Nye,

Plaintiffs-Appellees-Appellants,

v.

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants-Appellants.

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants and Third-Party Plaintiffs-Appellants,

MARINE ENGINE SPECIALTIES CORP.,

Third Party Defendant-Appellant.

Judgment of the Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in part and affirmed in part and that the third party complaint be and it hereby is dismissed in accordance with the opinion of this court with costs to be taxed against the appellants A/S D/S Svendborg and D/S of 1912 A/S.

A. Daniel Fusaro,
Clerk

By Vincent A. Carter
Chief Deputy Clerk

Order Denying Rehearing by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of October, one thousand nine hundred and seventy-four.

Present:

HON. LEONARD P. MOORE
HON. WILFRED FEINBERG
HON. WILLIAM HUGHES MULLIGAN
Circuit Judges

Docket No. 73-2280

—o—

DORRIS E. NYE, individually and as Administratrix Ad Prosequendum of Estate of CHARLES W. NYE, Deceased, et al.,

Plaintiffs-Appellees-Appellants,

v.

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants-Appellants.

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants and Third Party Plaintiffs-Appellants,

v.

MARINE ENGINE SPECIALTIES CORP.,

Third Party Defendant-Appellant.

—o—

A petition for a rehearing having been filed herein by counsel for the defendants and Third-Party Plaintiffs-Appellants.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

Order Denying Rehearing in Banc by Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of October, one thousand nine hundred and seventy-four.

Docket No. 73-2280

—o—

DORRIS E. NYE, individually and as Administratrix Ad Prosequendum of the Estate of CHARLES W. NYE, Deceased, SUSAN PAMELA NYE, and by their mother and natural guardian, DORRIS E. NYE, JUDITH DENISE NYE, GLORIA JANE NYE, PHILLIP REX NYE and DONNA CHARLENE NYE,

Plaintiffs-Appellees-Appellants,

v.

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants-Appellants.

A/S D/S SVENDBORG and D/S of 1912 A/S,

Defendants and Third Party Plaintiffs-Appellants,

v.

MARINE ENGINE SPECIALTIES CORP.,

Third Party Defendant-Appellant.

—o—

Order Denying Rehearing in Banc by Court of Appeals

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counself for the Defendants and Third-Party Plaintiffs-Appellants and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN
Chief Judge

Opinion of District Court

UNITED STATES DISTRICT COURT

S. D. New York.

May 18, 1973.

—o—

DORRIS E. NYE, Idividually and as Administratrix Ad Prosequendum of the Estate of Charles W. Nye, Deceased, et al., Plaintiffs,

v.

A/S D/S SVENDBORG and D/S OF 1912 A/S, Defendants.
A/S D/S SVENDBORG and D/S OF 1912 A/S, Defendants and Third-Party Plaintiffs,

v.

MARINE ENGINE SPECIALTIES CORP., Third-Party Defendant.

No. 69 Civ. 141.

—o—

GURFEIN, District Judge.

This action was begun in the Supreme Court of New York County against the defendant shipowner and its agent alleging that the death of plaintiffs' decedent on the high seas was caused by the unseaworthiness of the vessel "EVELYN MAERSK" and by the negligence of her crew. The action was removed to this Court upon the ground of diversity of citizenship. The defendants have earlier been found to have waived their right to trial by jury. The defendants, as third party plaintiffs, have brought an action for indemnification against Marine Engine Specialties Corp., the employer of the decedent for alleged breach of the warranty of workmanlike service. The case was tried without a jury.

Opinion of District Court

The subject matter jurisdiction rests on 28 U.S.C. § 1332—diversity of citizenship. Even if the action had remained in the State Court, it would lie under general maritime law for death caused by violation of maritime duties. Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).[1] Since there is diversity of citizenship, the limitation of federal question jurisdiction under Romero v. International Terminal Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1958) does not apply. Nor is the right to jury trial a matter for consideration, since that right has been waived.

Charles W. Nye was a United States citizen who was a repairer of ship pumps. He was flown from New York to the Canary Islands to repair a pump on the defendants' vessel, EVELYN MAERSK ("Evelyn"), a Danish flag ship. The Evelyn was equipped with feed pumps manufactured by Pacific Pumps of Los Angeles, supplied to the vessel by Kockums Mekaniska Verkstad of Malmo, Sweden ("Kockums"). On her maiden voyage, which made no call at United States ports, a feed pump failed and she put into the Canary Islands. Kockums was called by the vessel's owner and it ordered a new pump to be installed under the supervision of Pacific Pumps. In turn, Pacific, pursuant to a service agreement, asked Marine Engine Specialties Corp. "Marine"), a United States entity and the employer of plaintiffs' decedent Nye, to fly him there to supervise the installation. While ascending a pilot ladder drawn over the side of the vessel, Nye fell to his death on December 30, 1967 in the evening.

At 5:30 a. m. on the morning of December 30, 1967 the Evelyn had dropped anchor about a half mile East of the main channel of the port of Las Palmas (Jensen Dep. 32).[2]

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[1] *Moragne, supra,* was removed to the Federal Court on the ground of diversity of citizenship.

[2] Jensen was the marine superintendent of the A. P. Moller Steamship Company aboard for the maiden voyage.

A half hour later a replacement pump was delivered and hoisted on board. The defective pump was removed to the deck and the new pump was put in its place by the ship's engineers (Jensen Dep. 23). The installation was completed by the ship's own engineers after the accident (Jensen Dep. 94).

During the day the weather was uneven with periods of rain. After 4 p. m., however, all shower activity had ceased (Jensen Dep. 27). Some time during the day the ship had been informed by the ship's agent in Las Palmas that Nye, the deceased, would be arriving by pilot launch (Jensen Dep. 33-34). Between 4 and 5 p. m. preparations, in the form of the rigging of the ladders to be used in effecting Nye's boarding, were carried out (Jensen Dep. 68-69; Testimony of Chief Officer R. Moller, hereinafter "Moller"). The boarding apparatus so rigged consisted of an accommodation ladder and a pilot ladder. The accommodation ladder, rigged first (Jensen Dep. 68), was made of aluminum with fixed rails. It was a rigid ladder and was hinged to the platform at the height of the deck (Jensen Dep. 39-40). The platform, about ¾ of a meter or 30 inches square, extended from the side of the ship through an opening in the deck rail (Jensen Dep. 48-49). The accommodation ladder did not hang down perpendicularly from the platform but extended at an angle away from the side of the ship (Jensen Dep. 64; Pl. Ex. 5; Deft. Ex. Q).

The pilot ladder was made of wooden steps fixed to 2½ inch tarred hemp lines by means of wooden side blocks. The ladder was 16 meters long with forty-seven steps. Each step was .114 meters or approximately 4½ inches wide and .025 meters or approximately one foot apart. The pilot ladder was brand new and when rigged was being used for the first time (Jensen Dep. 95). Shortly before the pilot ladder was rigged it was inspected by Jensen. On the basis of his inspection, which took approximately fifteen minutes, Jensen determined that the ladder was in perfect condition

(Jensen Dep. 102-04). Prior to its rigging, the pilot ladder had been stored in an interior area of the vessel (bosun's storeroom) and was consequently not exposed to the elements during the preceding shower activity (Jensen Dep. 51). Chief Officer Moller made another inspection at the time he supervised the actual rigging. The pilot ladder was not attached to the accommodation ladder but was rather affixed to the two upper courses of the starboard deck rail. The lines of rope which form the sides of the ladder were flung over the uppermost rung of the rail, beneath the next one, up again and then made fast with knots (Jensen Dep. 91-92; Pl. Ex. 5). As the photograph in evidence (Pl. Ex. 5) indicates, the rigid accommodation ladder did not extend all the way to the water line. The difference was made up by the pilot ladder which reached down to within two feet of the water (Jensen Dep. 64; Moller).

The manner of boarding by this arrangement was to climb the pilot ladder, which hung parallel to the side of the vessel, until one reached the accommodation ladder. Then the person boarding could simply walk up the accommodation ladder to the deck. The reason advanced for employing this method of boarding was that it is dangerous for a launch to approach a rigid ladder (Jensen Dep. 56).

At the port of Las Palmas Mr. Nye boarded a pilot launch belonging to a third person not a party to this action. From the pilot launch Nye contacted the Evelyn by radio-telephone to inform them that he was on his way (Jensen Dep. 33). At 7:25 p.m. upon observing the approach of the launch Jensen ordered the anchor raised in order to make a lee. Jensen testified that this was normal practice when taking a person aboard. The purpose of executing the lee is to shield the side of the ship where boarding is to take place from the effects of wind and water motion (Jensen Dep. 30-31, 96). Though Jensen testified that his maneuver was completed just before the

launch reached the ship, she did not drop anchor again (Jensen Dep. 36). Captain Ash, the plaintiffs' expert, believed that she was under way at boarding and I so find.

The accommodation ladder and pilot ladder were illuminated by a gangway light of 400 watts, two floodlights of 200 watts each, and what were called cluster lights, totalling 375 watts, which were fixed to the ship's rail above the pilot ladder and which directed their light downward to the sea (Jensen Dep. 54-55, 63; Moller). According to Jensen's testimony the entire boarding area was well illuminated (Jensen Dep. 55). After two unsuccessful attempts to maneuver the pilot launch[3] close enough to the Evelyn to permit Nye to begin his ascent of the pilot ladder, the pilot boat was finally able to effect the transfer. At the time of the transfer the midship part of the launch was "very close" (Jensen Dep. 73-74). The launch was not moored to the Evelyn at the time of the transfer nor was there any attempt to do so (Jensen Dep. 76; Moller). Jensen testified that the waves were about three feet high (Jensen Dep. 76). The freeboard of the launch was three to four feet. The pilot ladder was not equipped with any hand holds (Jensen Dep. 76-77).

The actual transferral was effected without incident. Immediately after the transferral the launch pulled away (Jensen Dep. 97-98). Nye proceeded up the pilot ladder. Gripping the rope sides of the ladder, Nye climbed between one and three steps upward (Jensen Dep. 77; Moller). No one aided him or said anything to him as he mounted the ladder (Jensen Dep. 78, 90-91). Suddenly Nye stopped and shouted "help me, help me" (Moller; see Jensen Dep. 79), and shortly thereafter he fell into the water.

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[3] According to Jensen's testimony, the pilot launch measured around 25 to 30 feet in length and was 6 to 7 feet wide (Jensen Dep. 34, 90).

There was no one on the platform of the accommodation ladder, and there was no crew member with a gaff or other type of pole to assist the person boarding (Jensen Dep. 83-84). Moller descended only halfway down the accommodation ladder. When he saw that a line with a life ring had been thrown to Nye, Moller went back up, as he says, to direct operations instead of going down to help Nye. He went up to the poop deck, put the spotlight on and waved to the pilot boat to come closer.

Nor did Jensen wait to see Nye safely aboard. Instead, he went to the wheelhouse after Nye had put his foot on a rung of the pilot ladder (Jensen Dep. 79). When he heard a cry Jensen ran back to the rail and by that time saw Nye holding on to a life ring (Jensen Dep. 80). One of the sailors, Hansen, was holding onto the rope to which the life ring was attached. Hansen did not pull the rope or otherwise attempt to haul it in (Jensen Dep. 81-82). Jensen went back to the wheelhouse and telephoned the engine room to stop the propeller absolutely. After Nye fell into the water, the pilot launch attempted to effect a rescue (Jensen Dep. 89; Moller). Moller testified that it took him approximately four to five minutes from the time he quit the accommodation ladder until he had turned the additional spotlight (the starboard life boat light) on. When he had turned the light on, he no longer saw Nye holding onto the life ring. No marker lights were thrown out for fear of hitting Nye. No general alarm was sounded. No boat was lowered from the Evelyn though there was a search for half an hour (Moller). The crew of the Evelyn apparently played no part in the recovery of Nye's body sometime after the aforedescribed events (Jensen Dep. 101).

At the time of his death, Nye's physical appearance could be characterized as obese (Def. Ex.S, autopsy report). At the trial, data from physical examinations of Nye taken during the period August 22-November 7, 1966

were offered into evidence and analyzed by a medical expert. On August 22, 1966 Nye measured 6 feet in height and tipped the scales at 350 pounds. He suffered from swelling of the ankles (edema) and his blood pressure was 180/118. The diagnosis made at that time indicated that Nye was suffering from diabetes, obesity, hypertension and Pickwickian syndrome (Def. Ex.R; Testimony of Dr. Marcus Bloomfield, hereinafter "Bloomfield"). The latter syndrome is a complex of exogenous obesity (self-induced), somnolence, erythrocytosis and hyperventilation or a condition in which there is a reduced amount of air entering the pulmonary alveoli, resulting in elevation of the carbon dioxide tension (Dorland, Illustrated Medical Dictionary 717 (24th ed. 1965). This diagnosis was reconfirmed on September 6, 1966. The possible presence of a kidney disease seen in diabetics causing renal failure, was tentatively diagnosed (Bloomfield). Cardiomegaly, a morbid condition characterized by enlargement of the heart, with localized deposits of glycogen in the heart muscle was also detected. This latter diagnosis was supported by an X-ray and an electrocardiogram (Def. Ex.T; Bloomfield). Nye was described by one attending physician as a grossly obese white male diabetic (Def. Ex.T at p. J).

By November 7, 1966 Nye's weight had been brought down to 310 pounds. His blood pressure was down to 160/100. The edema had disappeared and his heart was characterized as "O.K." His obese condition was still described as serious despite the considerable weight loss of forty pounds (Bloomfield).

His obesity was apparently chronic, having its source in early childhood (Def. Ex.T at pp. F, I). There is no evidence to indicate that at the time of his death this chronically obese condition had been significantly reduced or that his Pickwickian syndrome had significantly abated. The Spanish autopsy report (in translation) is unspecific.

It merely notes that the corpse was "of a fat constitution, with a weight of one hundred to one hundred and sixty five kilos . . ." (Def. Ex.S) or approximately between 220 and 365 pounds.

When the pump was hoisted aboard earlier in the day the vessel alongside was tied to a boat rope. This was an item of equipment that could have been used to hold the pilot boat close to the vessel when the decedent ascended the rope ladder.[4] If the pilot boat had remained adjacent to the Evelyn with its stern near the ladder until Nye fell off the ladder, he would have fallen so close to the boat that he could have been lifted into it. Similarly if a man rope had been available Nye might have been able to steady himself on the ladder.

The ship argues that these accessories would have made no difference because Nye was already two rungs up the ladder when he lost his grip. This assumes that the issue is whether he "made" the pilot ladder safely. The issue is rather whether proper precautions were taken and proper equipment made available to prevent his falling off or to protect him from fatal consequences if he did fall. In the face of actual disaster even common custom that gets by most of the time is not the test of unseaworthiness in particular circumstances. See Trahan v. Superior Oil Co., 204 F.Supp. 627, 631-32 (W.D.La.1962), aff'd, 322 F.2d 234 (5 Cir. 1963). The ship was expecting a person, of uncertain lay status, not a professional pilot, to board a rope ladder while the vessel was making a lee with waves as high as three to four feet. In these circumstances someone should have been on the platform of the accommodation ladder to be ready to lend a hand if necessary and a man rope and a boat rope should have been made available. The operating negligence of the crew rendered the vessel unseaworthy.

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[4] I do not credit the testimony of the defendants' experts to the contrary.

Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944); Mitchell v. Trawler Racer, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960); Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S.Ct. 1410, 18 L.Ed.2d 482 (1967).

I find that the vessel was unseaworthy for boarding in the circumstances and that the unseaworthiness was the proximate cause of the death. That conclusion is based on the assumption that United States law governs, for I have not heard evidence on the foreign law respecting the unseaworthiness doctrine.[5]

But I also find that the shipowner was negligent in not supplying the safeguards mentioned in the circumstances. Under maritime law the owner of a ship owes a duty of reasonable care to all who are on board and boarding for purposes not inimical to the shipowner's legitimate interests. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). See Rivera v. Farrell Lines, Inc., 474 F.2d 555 (2 Cir. 1973); Grillo v. Royal Norwegian Government, 139 F.2d 237 (2 Cir. 1943). Thus, whether Nye qualified as a member of a ship's crew or not under the doctrine of Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), a duty of care was owed him to provide a reasonably safe method of boarding as part of the international maritime law of the sea. Superior Oil Company v. Trahan, *supra*, 322 F.2d at 235 (5 Cir. 1963).

I do find, however, that United States law in particular governs and that Nye who came aboard to install the new pump was entitled to a seaworthy ship.

Seven factors were listed in Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) to determine the

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[5] The Court determined earlier as a preliminary matter that the question of what law governs related only to the issue of unseaworthiness, and reserved further determination of the choice of law until the evidence was in. D.C., 358 F.Supp. 142.

governing law: (1) place of the wrongful act; (2) law of the flag; (3) allegiance or domicile of the injured; (4) allegiance of the defendant shipowner; (5) place of contract; (6) inaccessibility of foreign forum; and (7) law of the forum.

The Supreme Court also said: "Each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support." 345 U.S. at 586, 73 S.Ct. at 930.

In the case at bar an American company was asked to supply a man to install the pump. He came to the ship directly from the United States. As the Court of Appeals for the Fifth Circuit said in Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 467 (1966), cert. denied, 387 U.S. 908, 87 S.Ct. 1690, 18 L.Ed.2d 625: "In the context of this case, we believe the most significant choice of law factor to be the nationality of the injured and deceased seamen."

The citizenship of Nye and the factors surrounding his coming from the United States to board the ship in Spanish waters are sufficient to justify applying the law of the United States.[6] See *Symonette, supra*, 365 F.2d at 467; see Gilmore & Black, Admiralty, § 6-64 at 388 (1957).

Nor did Nye, in my judgment, fail to qualify as a beneficiary of the *Sieracki* unseaworthiness doctrine. See Pope & Talbot Inc. v. Hawn, 346 U.S. 406, 412-413, 74 S.Ct. 202, 98 L.Ed. 143 (1953). The ship was in navigation. Repair of the pump would clearly entitle the repairman to the status of a crew member. Such a person is "within the class protected by the warranty of seaworthiness as developed by federal maritime law . . ." The Tungus v. Skovgaard, 358 U.S. 588, 595, n. 9, 79 S.Ct. 503, 508, 3 L.Ed.2d 524; see also Lawlor v. Socony-Vacuum Oil Co., 275 F.2d

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[6] I do not mean to imply that just because a plaintiff is an American national United States law must apply. *Cf.* Tjonaman v. A/S Glittre, 340 F.2d 290 (2 Cir. 1965), cert. denied, 381 U.S. 925, 85 S.Ct. 1561, 14 L.Ed.2d 684 (1965).

599 (2 Cir. 1960). It is but a step from repair to installation of the pump which was actually accomplished by the ship's engineers. The vessel was in navigation, subject to the perils of the seas, rather than in drydock.

Whether the finding is that the vessel was unseaworthy or that her crew were negligent, the doctrine of contributory negligence as a ground for mitigation of damages is available. Pope & Talbot, Inc. v. Hawn, *supra;* Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939). And a failure to ask for better conditions in boarding and descending can be contributory negligence. Davis v. Associated Pipe Line Contractors, Inc., 305 F.Supp. 1345, 1349-1350 (W.D.La.1968), aff'd, 418 F.2d 920 (5 Cir. 1969), cert. denied, 397 U.S. 988, 90 S.Ct. 1119, 25 L.Ed.2d 396 (1970); Superior Oil Company v. Trahan, *supra,* 322 F.2d at 237.

I find that Nye, an obese individual, who, upon the evidence had had an earlier incident of boarding with difficulty and who had availed himself of a tie line for boarding on another occasion, should have requested additional aid in boarding. I find he was 50% at fault.

This, in turn, requires the employer of Nye to idemnify the shipowner for 100% of the damage, even if the employer was not itself personally negligent. Italia Soc. v. Oregon Stevedoring Co., 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732 (1969). The warranty of workmanlike performance extends not only to material but also to human resources. "Putting the Italia criteria in human terms, while Golten [the employer] did not warrant a perfect rigger, it did warrant one who would not in fact be negligent." McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334, 1337 (2 Cir.), cert. denied, sub nom. Golten Marine Co. v. Trelleborgs Angfartygs A/B, 395 U.S. 946, 89 S.Ct. 2020, 23 L.Ed.2d 464 (1969).[7]

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[7] The employer of the rigger was not a stevedore.

The harshness of the *Italia* rule is mitigated in this case because I find that the employer of Nye was, in fact, negligent in ordering a man in Nye's physical condition to hazard a journey which could involve climbing onto a vessel at sea. *Cf.* Hartnett v. Reiss Steamship Company, 421 F.2d 1011, 1018 (2 Cir. 1970).[8]

Accordingly, the plaintiffs will receive one-half of the damages found from Marine Engine Specialties Corp.

THE FAILURE TO RESCUE

In view of the above determination that unseaworthiness was the proximate cause of death, it is not essential to decide whether there was also negligence in failing to rescue the decedent. But, since there may be an appeal, I find that the crew was reasonably diligent in the circumstances. The pilot boat was already in the water, and launching a lifeboat on the starboard side would not only have taken some time, but also might have proved dangerous, for it might have hit the man in the water. Lights were turned on and observation was made from the deck, a more effective vantage point than the surface of the water. The engines were stopped and a seaman stood by with a life-line. The plaintiffs argue that a life raft should have been dropped and the thought occurs that a seaman might have been sent to the botom of the ship's ladder or into the sea. Under the emergency conditions, however, reasonably proper action appears to have been taken, although if a crew member had already

[8] Its negligence would not have allowed contribution by it as a joint tort feasor, for there is no right of contribution in a non-collision maritime case. Halcyon Lines v. Haenn Ship Corp., 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1952). That is still the law. Atlantic etc., Coast Line Railroad Co. v. Erie Lackawanna Railroad Co., 406 U.S. 340, 92 S.Ct. 1550, 32 L.Ed.2d 110 (1972).

been ear the bottom of the ladder before the fall, he might have prevented the drowning. Since there is no finding of negligence in the rescue operation as such, it becomes irrelevant to note that there is no defense of contributory negligence to the duty of rescue. Kirincich v. Standard Dredging Co., 112 F.2d 163 (3 Cir. 1940).

DAMAGES

Having determined that under United States law the ship was unseaworthy, we must also apply that law to determine the damages due to survivors of a decedent under that law.

The plaintiffs have a proper claim for relief in a diversity of citizenship case for damages for wrongful death on the high seas caused by unseaworthiness. Moragne v. States Marine Lines, *supra.*

Since this action is not on the admiralty side of the Court it cannot be considered as brought under the Death on the High Seas Act, 46 U.S.C. § 761 et seq., but that Act may afford analogy in determining the schedule of beneficiaries. See *Moragne, supra,* 398 U.S. at 407, 408, 90 S.Ct. 1772. And I believe we may also resort to cases under it for the elements of damage in an action for death on the high seas, since there is no logical reason for determining damages differently where the action is on the law side rather than in admiralty.

The awards are to be computed on a two-stage basis, and in the words of Judge Weinfeld, (1) the damages to the date of decision are to be totalled without discount, and increased by pre-judgment interest, and (2) future damages are to be discounted to their present value. Petition of Marina Mercante Nicaraguense, S. A., 248 F.Supp. 15, 25-26 (S.D.N.Y.1965), aff'd, 364 F.2d 118 (2 Cir. 1966).

The elements of damage are:

(1) the decedent's earning capacity, what he might reasonably have been expected to earn had he lived, and the extent to which the surviving defendants "might logically and reasonably have been expected to share in it." O'Connor v. United States, 269 F.2d 578, 582 (2 Cir. 1959).

(2) Loss of a father's care, guidance and training. Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583, 588, 593 n. 9a (2 Cir. 1961), but this must be reducible to pecuniary value. First National Bank in Greenwich v. National Airlines, Inc., 171 F.Supp. 528 (S.D.N.Y. 1958), aff'd, 288 F.2d 621 (2 Cir. 1961).

(3) Funeral expenses. Dennis v. Central Gulf S/S Corp., 453 F.2d 137 (5 Cir. 1972).

(4) Pain and suffering. See *Richardson, supra.*

On the other hand, loss of consortium is not compensable. Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257 (2 Cir. 1963).

Applying these principles, I find:

1. The decedent was 46 years old and left him surviving a widow and five children whose ages were 10, 12, 13, 15 and 21.

2. The decedent earned $15,462.67 in the year 1967.

3. The defendants have conceded that if Nye were alive today he would be earning $20,000 a year.

4. A normal, healthy male of 46 had a life expectancy of 26.5 years to age 72.5.

5. There was no evidence of working life expectancy. I will assume age 60 in view of the peripatetic nature of the employment.

6. The decedent was an obese individual, with diabetes and high blood pressure (hypertension) and cardiomegaly, with a possible kidney disease complication. His chances for longevity were considerably below average. His morbid condition shortened his life expectancy by at least ten years, and I would judge that his work expectancy would not exceed age 55. These are not scientific findings, see Civil v. Waterman S. S. Corp., 217 F.2d 94, 99 (2 Cir. 1954), but I think they give the plaintiffs the benefit of some doubt.

7. I will accept the figure of $20,000 a year as the measure of the decedent's earnings without deducting for income taxes from this time forward, (see McWeeney v. New York, N. H. & H. RR Co., 282 F.2d 34, 35-39 (2 Cir. 1960), cert. denied, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93; Petition of Marina Mercante Nicaraguense, S. A., *supra*, 364 F.2d at 125-126), and take $15,500 for the years 1968-May 1973, four years and five months.

8. I will follow Judge Weinfeld's formulation in *Marina Mercante, supra*, 248 F.Supp. at 27 (since the facts are quite similar) that the amount of contribution of which the family was deprived, where there was a wife and four children, was 80% (one child was over 21), a wife and two or three children 75% (two of the children will reach majority over the next five years).[9]

AWARD TO DATE

A. Loss of Pecuniary Contribution. From January 1, 1968 to May 1, 1973 the decedent would have earned at the rate of $15,500 a year, the sum of $1,292 per month for 53

[9] The wife and each child are considered an aliquot part of the family unit. This was approved in *Marina Mercante, supra*, 364 F.2d 118, *passim*.

months, or a gross of $68,476, of which 80% equals $54,780, or $12,400 a year.

B. Loss of Nurture. For each child $75 a month or $300 for the four children. For 53 months this equals $15,900.

C. Pain and Suffering. $2,000.

D. Funeral Expenses. $2,625.58.

Total: $75,305.58.

POST-JUDGMENT AWARD

1. Assuming $20,000 a year compensation for the remaining five years of work expectancy to age 55, the following is a table reflecting the appropriate distribution to which each family member is entitled discounted to present value. Included in the distribution table are the amounts to which the children are entitled for loss of nurture.

YEAR 1 (80% OF $20,000)

Age of Children	Family Member	Compensation for lost earnings	Compensation for loss of nurture
	Wife	$3,200	–0–
Over 21	Child A	–0–	–0–
19	Child B	$3,200	$900
17	Child C	$3,200	$900
16	Child D	$3,200	$900
14	Child E	$3,200	$900

YEAR 2 (80% OF $20,000)

	Wife	$3,200	–0–
Over 21	Child A	–0–	–0–
20	Child B	$3,200	$900
18	Child C	$3,200	$900
17	Child D	$3,200	$900
15	Child E	$3,200	$900

Opinion of District Court

Age of Children	Family Member	Compensation for lost earnings	Compensation for loss of nurture
	YEAR 3 (75% OF $20,000)		
	Wife	$3,750	–0–
Over 21	Child A	–0–	–0–
21	Child B	–0–	–0–
19	Child C	$3,750	$900
18	Child D	$3,750	$900
16	Child E	$3,750	$900
	YEAR 4 (75% OF $20,000)		
	Wife	$3,750	–0–
Over 21	Child A	–0–	–0–
21	Child B	–0–	–0–
20	Child C	$3,750	$900
19	Child D	$3,750	$900
17	Child E	$3,750	$900
	YEAR 5 (75% OF $20,000)		
	Wife	$5,000	–0–
Over 21	Child A	–0–	–0–
Over 21	Child B	–0–	–0–
21	Child C	–0–	–0–
20	Child D	$5,000	$900
18	Child E	$5,000	$900

TOTALS

Family Member	Gross Amount of Compensation for lost earnings plus loss of nurture	Average Gross Amount per Year	Discount Rate of 5% Using a Factor of 4.329	Net Distribution right per family member
Wife	$18,900	$3,780	X 4.329 =	$16,363.62
Child A	–0–	–0–	X 4.329 =	–0–
Child B	$ 8,200	$1,640	X 4.329 =	$ 7,099.56
Child C	$17,500	$3,500	X 4.329 =	$15,151.50
Child D	$23,400	$4,680	X 4.329 =	$20,259.72
Child E	$23,400	$4,680	X 4.329 =	$20,259.72
TOTALS	$91,400			$79,134.12

The total of the award to date and the post-judgment award = $75,305.58 plus $79,134 = $154,439.58, divided by 2 (50% contributory negligence) = $77,220. Under the teaching of Moore-McCormack Lines, Inc. v. Richardson, *supra*, 295 F.2d at 592-595, pre-judgment interest at 5% per annum is awarded on the sum of $37,653 (50% of the pre-judgment award). The defendants shall have costs and counsel fees against the third-party defendant.

The foregoing shall constitute the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

Submit decree in accordance with the foregoing.

FILED
FEB 10 1975
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-893

A/S D/S SVENDBORG & D/S AF 1912 A/S,

Petitioners,

—against—

MARINE ENGINE SPECIALTIES CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
ISSUES	1
EVIDENCE AND RULINGS ON TRIAL	2
POINT I—The rulings of the Court of Appeals as to the conclusions of the District Court were correct	6
POINT II—The Court of Appeals properly held that by any application of law, the ship was not entitled to a warranty of workmanlike performance from respondent	8
POINT III—The Court of Appeals properly found that the ship was not entitled to indemnity from Nye's employer even though Nye was held contributorily negligent	10
CONCLUSION	11

Cases Cited

Albanese v. N.V. Nederl. Amerk., Stoom. v. Maats, etc., 346 F. 2d 481 (2nd Cir. 1965)	9
Calderola v. Cunard Steamship Co., 279 F. 2d 475 (2nd Cir. 1960)	8
Davis v. Chas. Kruz & Co., Inc., 483 F. 2d 184 (9th Cir. 1973)	9
Hobart v. Sohio Petroleum Co., 445 F. 2d 435 (5th Cir. 1971)	9
Italia Societa v. Oregon Stevedoring Co., Inc., 376 U.S. 315 (1964)	8
Loffland Brothers Company v. Roberts, 386 F. 2d 540 (5th Cir. 1967)	10

PAGE

Schwartz v. Compagnie General Transatlantique, 405 F. 2d 270 (2nd Cir. 1968) 9

Superior Oil Company v. Traham, 322 F. 2d 234 (5th Cir. 1963) 8

Weyerheuser S.S. Co. v. Nacirema Operating Co., Inc., 355 U.S. 563 (1958) 9

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Issues

Whether the Court of Appeals was warranted in reversing the holdings of the District Court against respondent as wholly unsupported by the evidence.

Whether the Court of Appeals properly ruled that the warranty of workmanlike performance was completely inappropriate on the evidence presented.

Whether the Court of Appeals properly held that there were no grounds for imputing the deceased's negligence to the respondent.

Evidence and Rulings on Trial

Marine Engine Specialties Corp. was a United States corporation with its place of business in the City, County and State of New York (67a, 70a).* This corporation was the East Coast Service Representative for Pacific Pump, the manufacturer of the marine pumps with which the t/t Evelyn Maersk was equipped on and before December 30, 1967. The t/t Evelyn Maersk was a Danish flag vessel which, during its maiden voyage on December 30, 1967, put into the port of Las Palmas, Canary Islands, in order to obtain a replacement of a defective feed pump (80-81a). The ship anchored about one-half nautical mile east of the harbor piers at about 5:30 a.m. (304-305a). At about 6:00 a.m. on the date of arrival the replacement pump was delivered by launch and lifted aboard with the ship's boom (22a, 100a, 305a-306a).

Meantime, Charles W. Nye, who was employed by the Marine Engine Specialties Corp. as a service engineer for Pacific Pump products, was instructed by his employer to go to Las Palmas and there to contact the agent of the t/t Evelyn Maersk (81a). There is no evidence to indicate that Marine Engine Specialties Corp. had the slightest knowledge of where the vessel was in the port. At 4:00 p.m. on December 30, 1967 the t/t Evelyn Maersk's chief officer was notified to expect the arrival of some type of an expert (333a, 404a). The Chief Officer had an accommodation ladder-pilot ladder arrangement set up for a gangway (333a, 404a). No man rope, intended to per-

* Figures in parentheses refer to trial appendix.

mit the boarder to steady himself getting on the pilot ladder (191a-192a), was rigged in this gangway (192a, 196a, 304a). Nor were boat ropes rigged to secure the launch alongside during transfer of the boarder (340a).

Sometime after 6:30 p.m. the Chief Officer was informed that Mr. Nye was approaching the ship in a launch (347a) just about the time that the ship was drawing in its anchor (349a), so that it was already underway (348a) and moving slowly (327a). When the launch arrived alongside, the ship made a lee (349a). There was then a 17- to 21-knot-per-hour north-northeast wind (232a, 307a) and the waves were from three to six feet in height (196a). The ship's log characterized the sea as pretty rough and somewhat heavy (405a-406a). It was dark at the time (175a-176a) but the ladder was illuminated by a cluster of lights and a spot light (343-344).

Although there were crewmen on deck with the Chief Officer when the launch came up (408a) at about 7:30 p.m., (351a, 378a) no member of the crew was stationed at the lower platform of the accommodation ladder to assist the boarder in climbing up the pilot ladder to the foot of the accommodation ladder (362a).

The launch had to make a number of passes at the ship before it could get close enough to effect transfer of the plaintiff's intestate (173a, 177a, 352a). Even with the lee created by the ship the waves were three feet high (176a). There was expert opinion that good seamanship required double boat ropes (177a, 189a-191a, 205a) and man ropes (192a, 251a) under existing conditions.

When Mr. Nye finally got onto and up two rungs on the pilot ladder, he stopped, cried for help and fell off into the water (359a, 360a, 379a-381a). A life ring was thrown to Nye (361a) which he grasped (255a-256a) but the crew member who held the line to which the ring was attached

never pulled it in. Except for playing an adis light on the water (385a-387a, 394a), lowering an aft boat ladder (373, 384) without having a crewman descend it (374a, 375a) and the Chief Officer's signalling the launch with his hands to come in closer (371a), no alarm was sounded (397a), no lifeboats were lowered (388a, 389a), no marker lights or life rings were thrown in the water (394a-395a) and nothing else was done in the form of rescue effort other than those of the crew who were on deck looking for Nye (388a, 389a) until 10:17 p.m. when the ship sailed out of the harbor (390a) without having found the man overboard.

The District Court found and held:

> "The ship was expecting a person of uncertain lay status, not a professional pilot, to board a rope ladder while the vessel was making a lee with waves as high as three to four feet. In these circumstances someone should have been on the platform of the accommodation ladder to be ready to lend a hand if necessary and a man rope and a boat rope should have been made available. The operating negligence of the crew rendered the vessel unseaworthy." (90a-91a)
>
> • • •
>
> "I find the vessel was unseaworthy for boarding in the circumstances and that the unseaworthiness was the proximate cause of the death." (91a)
>
> • • •
>
> "But I also find that the shipowner was negligent in not supplying the safeguards mentioned in the cirstances." (91a)

Despite the fact that the late Charles W. Nye was a graduate marine engineer, the only testimony of his com-

petence or qualifications to negotiate his own transfer from launch to ship under the weather and sea conditions existing at the time here in issue was that he had and could be expected to have had no such training (276a-280a).

It was established that the deceased was obese and had a number of chronic ailments which would have foreshortened his life had he not met with this accident (494a-495a, 544a-545a). However, the only cause of death testified to was drowning (538a). Experts could not state that Mr. Nye had suffered a cardiovascular or cerebral accident (493a-494a, 540a, 549a) and there was no proof that any of his physical conditions were proximately related to the occurrence of this accident. Although it was said that Mr. Nye's condition prevented him from strenuous work over a long period of time (555a), the medical expert who gave that opinion would not state that he was a bad risk (545a). The only proof that Mr. Nye's condition had any effect on his ability to climb ladders was the testimony that once previously, after he had climbed a pilot's ladder, he was observed to be breathing hard (603a).

The ship's expert testified that if a ship's pump had to be replaced en route it is normally done by its crew (596a) and the only function of the guarantee engineer is to ascertain what went wrong with the old pump and to see that the new one was properly installed (589a). The plaintiff's expert testified substantially to the same effect (152a-155a).

The only negligence the District Court found against Marine Engine Specialties Corp. was that it ordered a man in Nye's physical condition to hazard a journey which could involve climbing into a vessel at sea (93a-94a).

POINT I

The rulings of the Court of Appeals as to the conclusions of the District Court were correct.

The findings of the District Court, that the ship was negligent in the inadequate and inferior facilities it afforded for the deceased's protection in obtaining access to it, was not disturbed by the Court of Appeals.

However, there was no evidence in this case from which any inference could be drawn that Marine Engine Specialties Corp. could have known or anticipated that the ship to which it sent Nye thousands of miles away would require him to board that vessel from a launch while the ship was underway in a rough and heavy sea with winds from 17 to 21 knots per hour, waves from 3 to 4 feet and without the ship having supplied any of the necessary safeguards called for under the existing circumstances. The District Court held that the ship should have provided a means of access suitable for the safe boarding of "a person of uncertain lay status". Nye's employer was entitled to expect that no matter where the ship was located and what the weather conditions were when Nye came to it, the ship would provide its employee with a reasonably safe method of boarding. This the District Court held was the ship's obligation (91a). The existing sea conditions at the time of boarding were unpredictable by this respondent and the commensurate measures to be taken by the ship to assure safe access were wholly and solely within the ship's subjective decisional and operational process.

Nor is there any proof on the record from which a finding could be made that Nye, for all his obesity and ailments, could not transfer from a launch and climb a pilot's ladder under normal conditions or that he could not have effected transfer here if the proper safeguards had been

provided or that he could not do his designated job aboard of overseeing the crew's installation of the new feed pump. The medical experts did not attribute any of his physical conditions as having caused or contributed to Nye's accident. The most that a fact witness could say was that on a previous occasion Nye had to stop and catch his breath after having climbed a pilot's ladder all the way from launch level up to the main deck of another ship. Where is there any proof from this of the negligence of the employer in supplying an inadequate person for his intended purpose?

It is submitted that the District Court had no foundation in evidence for its conclusion that Marine Engine Specialties Corp. was negligent in ordering a man of Nye's condition to hazard a journey which would involve climbing onto a vessel at sea. As the Court of Appeals held, the only proof shows that the ship alone was negligent in unforeseeably forcing Nye to board in the middle of what was tantamount to a storm without providing him with adequate facilities and safeguards to do so. That situation, by any stretch of the imagination, could not, on the evidence in this case, have been anticipated by Nye's employer.

Even by the strictest construction of the cases cited in petitioner's brief setting forth the "unless clearly erroneous" rule, the Court of Appeals was well warranted, indeed it was mandated, in reversing the District Court's conclusion.

POINT II

The Court of Appeals properly held that by any application of law the ship was not entitled to a warranty of workmanlike performance from respondent.

The very entranceway to the ship, before Nye could ever come up to it, was already rendered dangerous and defective by the ship itself in the negative conduct of its crew and its flagrant failure to provide minimal safe access facilities. This was found by the District Court and confirmed in the Court of Appeals.

Thus, without any opportunity on the part of Nye or his employer to take control of or to touch any part of the ship or to assume any duty to the ship, the ship breached its duty of providing him with a safe means of access (*Superior Oil Company* v. *Traham*, 322 F. 2d 234, 235 [5th Cir. 1963]). The employer of a person to do work aboard ship cannot be charged with a breach of warranty of workmanlike performance where it could not reasonably be found to have had an opportunity to discover the dangerous condition created by the ship so as to be charged with an obligation to correct or minimize the possibility of accident (*Calderola* v. *Cunard Steamship Co.*, 279 F. 2d 475, 478 [2nd Cir., 1960]). The rule *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 323 (1964) relied upon by petitioner is readily distinguishable since the injury-producing and defective condition here was created by the ship, it existed in place before Nye ever came to the ship and it was never under the control or supervision of Marine Engine Specialties Corp. The means of access was the creation solely of the ship and it alone had the power to minimize the risk, not Marine Engine Specialties Corp. which could not even know what access accommodations were provided.

Also, the ship's conduct here, in actively preventing the Marine Engine Specialties Corp. not only from being able to do a workmanlike job, but also from having its employee *even start to come aboard* safely, was such as to preclude said ship from being entitled to a warranty of workmanlike performance (*Weyerheuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U.S. 563, 567 [1958]; *Albanese* v. *N.V. Nederl. Amerk., Stoom.* v. *Maats, etc.*, 346 F. 2d 481 [2nd Cir., 1965]).

In addition, since Nye was not to perform any duty traditionally done by seamen, he was not entitled to the warranty of seaworthiness from the ship. It follows, therefore, that the ship should not be entitled to a warranty of workmanlike performance from Marine Engine Specialties Corp. (*Schwartz* v. *Compagnie General Transatlantique*, 405 F. 2d 270, 276 [2nd Cir., 1968]; *Hobart* v. *Sohio Petroleum Co.*, 445 F. 2d 435, 438-439 [5th Cir., 1971]; *Davis* v. *Chas. Kruz & Co., Inc.*, 483 F. 2d 184, 187-188 [9th Cir. 1973]). It is submitted that the District Court's characterization of Nye's function aboard ship to be that of a repair man was the product of rationalization without any foundation in proof.

Accordingly, whatever theory of law is to be applied to the proof in this action, the Court of Appeals was correct in holding as a matter of law that the ship here was not entitled to the warranty of workmanlike performance from Marine Engine Specialties Corp.

POINT III

The Court of Appeals properly found that the ship was not entitled to indemnity from Nye's employer, even though Nye was held contributorily negligent.

Since no warranty of workmanlike performance was owed by Marine Engine Specialties Corp. to the ship, there can be no *per se* imputation of the negligence of Nye to his employer (*Loffland Brothers Company* v. *Roberts*, 386 F. 2d 540, 549-550 [5th Cir. 1967]). The ship had the burden of proving the elements of Marine Engine Specialties Corp.'s own negligence proximately related to its employee's accident in order for the ship to be entitled to indemnity against it. The proof showed conclusively that Marine Engine Specialties Corp. was not in any way negligent.

The petitioners have conceded the correctness of the holding of their own fault in reference to the Nye accident by not addressing their application for a writ of certiorari to that element of the judgment. The extent and character of the part which the ship played in the death of Charles W. Nye, as seen from the proof, amounted to a flagrant abandonment of every duty it owed to afford the deceased a safe means of access. However, the petitioners now make vain attempts by a voluminous argument and by the offer of selective self-serving excerpts from decisional law to persuade this Honorable Court that the perfectly proper determination of the Court of Appeals was somehow defective, in order to relieve themselves of the consequences of their sole fault which every realistic concept of maritime law demands the said petitioners should bear. This injustice should not be allowed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-893

A/S D/S SVENDBORG & D/S AF 1912 A/S,

Petitioners,

against

MARINE ENGINE SPECIALTIES, CORP.,

Respondent.

PETITIONERS' BRIEF IN REPLY

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PETITIONERS' BRIEF IN REPLY

Statement

Petitioners believe it appropriate to file this short brief in reply to refocus the facts and issues which have been somewhat blurred by the brief in opposition.

The Facts

Not satisfied with relitigating the facts in the Court of Appeals, respondent seeks to do so as well in this Court.

1. Respondent challenges (p. 9) the District Court's designation of decedent as a "repairer of ship's pumps" as a "rationalization without any foundation in proof". Yet, this is exactly how Edwin Burke, President of respondent described his function aboard the vessel (Pl. Ex. 11,

p. 12).* The Court of Appeals described him a little more elegantly as a (p. 2A) "service engineer for pumps manufactured by Pacific".

2. Respondent lays considerable stress on the wind and sea conditions although conceding that the ship created a lee to minimize their affect. So carried away does respondent become in attempting to show an unusual boarding situation, that it is moved to claim that petitioners forced decedent "to board in the middle of what was tantamount to a storm * * *". (p. 7) Here again, respondent overlooks the fact that the most difficult part of this or any boarding operation, the transition from the launch to the pilot ladder, was in the language of the District Court (p. 19A) "effected without incident".

There is not a shred of evidence that decedent was washed, knocked or blown off the pilot ladder.** "Gripping the rope sides of the ladder", he had, according to the District Court, "climbed between one and three steps upward" "Suddenly Nye stopped and called 'help me, help me' " and then fell into the water. The Court of Appeals noted as well (4A) that after decedent proceeded 1 or 2 steps on the pilot ladder "he stood still and called for help". Shortly thereafter, he "let go of the pilot ladder and had fallen into the sea". It seems manifest that no external force drove decedent off the pilot ladder, he was simply unable to climb or even hold on, and was in obvious distress.

3. Respondent notes that the autopsy attributed the cause of death to drowning (p. 5) and then goes on from

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* "The EVELYN MAERSK was bound, I believe, for the Persian Gulf, and would pick Mr. Nye up at the Canary Islands and he would ride down to Cape Town, South Africa, and in the course of the transit between Las Palmas in the Canary Islands and Cape Town, repair both units."

** The vessel was not rolling. (Capt. Jensen dep. p. 36).

"Q. Was the ship, that is your ship, rocking and rolling in the waves?

A. No."

this to state that there was no proof that any of his physical conditions were proximately related to the occurrence. The fact is that the autopsy, performed in the Canary Islands, was deficient. Dr. Helpern examined the autopsy report and found that the internal organs were (540a) "rather inadequately described with regard to determining what diseases may have been present". Dr. Bloomfield said (493a) "Unfortunately, this autopsy report is grossly inadequate to make a diagnosis of anything."

It goes without saying that drowning did not cause decedent to fall off the ladder.

4. Respondent also proposes (p. 4) to relitigate here the rescue efforts which both the District Court (26A-27A) and the Court of Appeals (8A-9A) upheld.

5. Respondent claims (p. 4-5) that decedent could be expected to "have had no such training" for boarding the pilot ladder here. Again, respondent is answered by its own President who said he had done so "many times" (Burke, Pl. Ex. 11, p. 17).

I

The District Court finding that respondent was negligent in ordering a man in decedent's physical condition "to hazard a journey which could involve climbing onto a vessel at sea" is supported by substantial evidence as fully described in the Petition (p. 7-8). The most reasonable explanation why decedent suddenly was unable to climb or even hold onto the pilot ladder can be found in one or more of his many disabilities or infirmities. At the least the finding of fact as to this was not clearly erroneous.

Certainly, it is possible that the District Court could have ruled in favor of respondent on this issue just as it is possible that the same Court could have decided that there was no liability on petitioners' part in the first place. The point is that it did not do so, and unless the Court of Appeals is to serve as a retrier of the facts, for which it has been criticized by respected authority (Petition p. 9-14), respondent has already had its full day in court under our system of justice. Petitioner should not be deemed unduly presumptuous for maintaining that in nine of the other Courts of Appeals, this Petition would not have been necessary.

II

Respondent argues in Points II and III that where no warranty of seaworthiness is owed by the shipowner, it logically follows that no warranty of workmanlike service is owed by the injured or deceased worker's employer. While petitioners contest the validity of such a proposition, they do not have to meet it here since the District Court found that decedent *was* entitled to the warranty of seaworthiness at (22A-23A) and the Court of Appeals bypassed this finding without reversing it (6A).

It is at this point that respondent's anxiety over having decedent designated a "repairer of ship pumps" becomes transparent. It is the underpinning for the arguments in respondent's II and III that the warranty of workmanlike service is inapplicable. Respondent patently fears a confrontation with *Booth Steamship Co., Ltd.* v. *Meier and Oelhaf Co.*, 262 F.2d 310, 312-313 (2d Cir. 1958) which was

followed by this Court in *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 318, 323 (1964).

Dated: New York, New York
February 20, 1975

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